

In the Supreme Court

OF THE

UNITED STATES

October Term, 1903.

No. 169

I. H. ADAMS,
Plaintiff in Error,

vs.

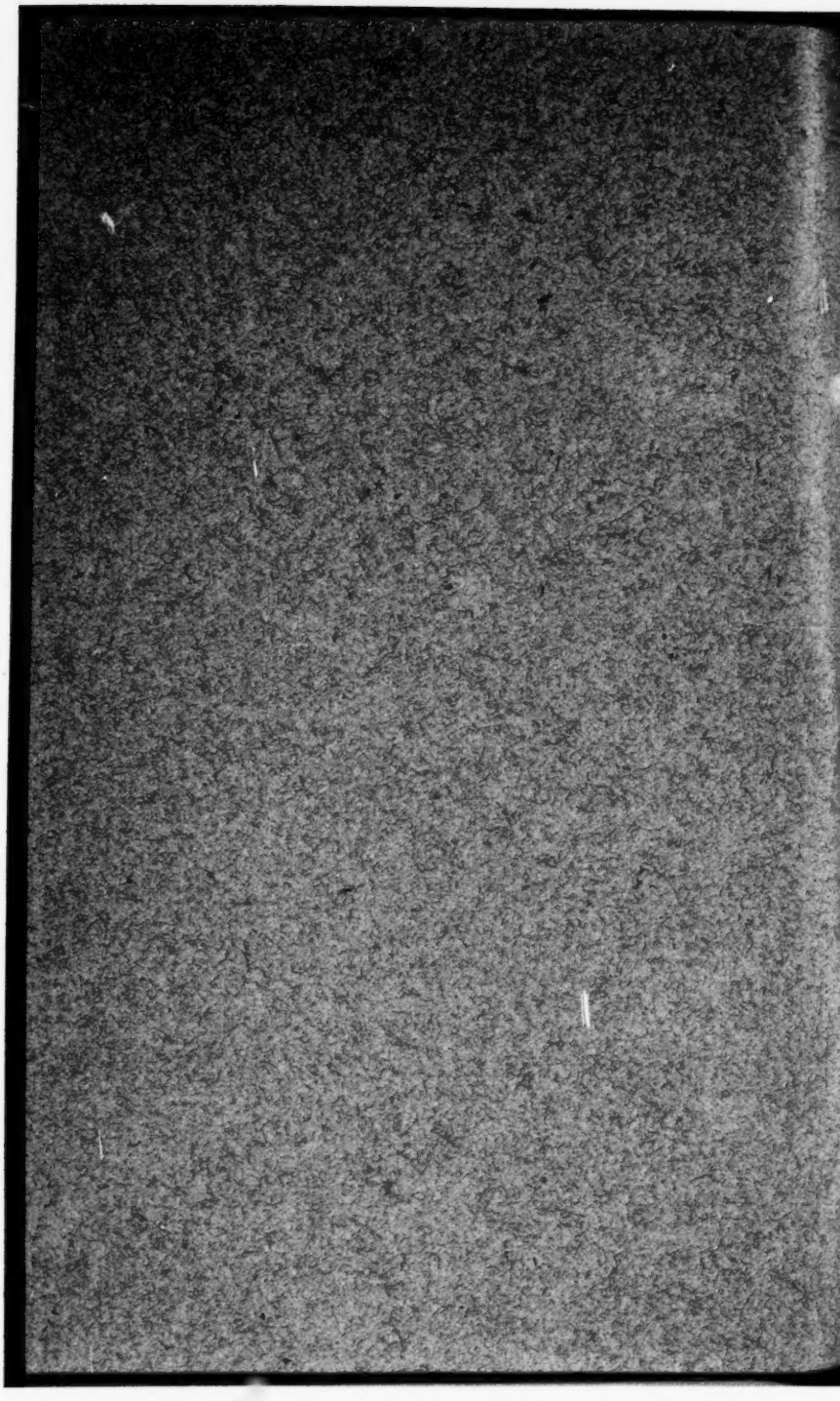
J. M. CHURCH, Administrator of R. M. Steel, deceased,

R. J. SLATER,
WILL R. KING,
Attorneys for Plaintiff in Error.

In Error to the Circuit Court of the State of Oregon for Malheur Co.

Filed _____

(18,152)



16099

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October Term, 1903,

I. H. ADAMS,
Plaintiff in Error.
vs.
J. M. CHURCH, Administrator of R. M. Steel, deceased,
Defendants in Error.
18752

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

This case stands on a motion by the defendant in error to dismiss for want of jurisdiction here. This required, under the rules, the defendant in error to serve his brief first, which he has done, and his statement of

the case several very important errors occur, which necessitate a statement from us, and a careful examination of the record by this Court, to determine the truth in regard to these differences.

This is a writ of error to the Cicuit Court of the State of Oregon for Malheur County, to review a decree, rendered therein according to a mandate of the Supreme Court of the State of Oregon, wherein it is decreed that the West half of the Southeast quarter, and the East half of the Southwest quarter, Section 24, Township 18 South, Range 45, E. W. M., situated in Malheur County, Oregon, be the property of a partnership firm of Steel & Adams, and not the property of the plaintiff in error.

The suit was commenced by R. M. Steel in his lifetime against I. H. Adams for a dissolution, and settlement of the partnership relations theretofore existing between them, and involved a large amount of assets and liabilities.

The only question involved in the suit, which can be considered here is so much of the decree as refers to the land above described, therefore, we will refer only to those particular parts of the pleadings which pertain to the land.

"Paragraph 6 of the complaint is in the following words, "That the money so invested in said partnership by plaintiff, and the said money advanced said firm, and business, there has been purchased by and for said partnership and really belongs to said firm:

The east half of the northwest quarter and the north-half of the northeast quarter, of section 20, township 15 south, range 40, E. W. M., and the west half of the north east quarter, and the northeast quarter————————,

and the northwest quarter of the southwest quater, section 26, in township 15, south of range 39 E. W. M., W. ½ *S. E.* ¼, *E.* ½ *S. W.* ¼ E. ½ S. E. ¼, E. ½ N. E. ¼, and the west half of the northwest quarter, and the west half of the southwest quarter, *of section* 24, *township* 18, *south of range* 45 *E. W. M.*, all in Malheur County, State of Oregon, together with the many and valuable and permanent improvements thereon, of the approximate value of about $5,000, etc," (See page 2, printed record).

"Paragraph 9. that of said real estate the said west half of the southeast quarter, and the east half of the southwest quarter, of section 24, township 18, south of range 45, E. W. M. the said defendant has procured the title to be taken in his own name, and placed thereon valuable improvements consisting of fences, orchards, wells and wind-pump, at great cost and expense, when in truth and in fact the same were bought with partnership funds and the pltintiff alleges the same to belong to said firm and the said defendant should be required to account for such property and convey the same to the said partnership," (See page 3 of the printed record).

The prayer of the complaint is as follows, "WHEREFORE, the plaintiff pravs that defendant be enjoined from further managing or controlling, or disposing of, or encumbering any of said partnership property or business, and that a receiver be immediately appointed by the court, to take charge of the assets of every description, belonging to the partnership, and manage the same under the direction, orders and decrees of this court, that to preserve and sell the same for the benefit of said partnership and pay off the firm indebtedness out of said assets."

"2 That said firm of Steel and Adams be dissolved etc."

"3 That defendant be required to account to plaintiff and under the directions of the court for all the transactions of the said firm, and for plaintiff's advancements and just dues therein, and property and moneys by him handled and expended, both for the firm and for himself."

"4 That after the firm debts and liabilities are paid that if there be anything left that this plaintiff may have returned to him his capital therein invested, and his claims fully paid and his share of the profits of said business."

"5 That defendant be required to convey the partnership what property belongs to said firm."

"And for general relief, etc." (See pages 3 and 4 of the printed record).

The above allegations of the complaint were specifically denied by the answer (See pages 7 and 8 and 9 of the printed record).

And in the further and separate answer the defendant, (plaintiff here) alleged that long prior to the time, when the plaintiff and the defendant entered into the articles of agreement and co-partnership, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof, the defendant had filed under the timber culture act of the United States on the west half of the southeast quarter, and the east half of the southwest quarter of section 24, township 18, south range 45 E. W. M., and that prior to the making of said contract between the plaintiff and the defendant, this defendant had cleared off and prepared for artificial irrigation about 60 acres of

said piece or parcel of land, and every year since the said time, the said land has been cultivated, and crops produced thereon consisting of potatoes, grain, alfalfa, used and appropriated by the said firm.

That the crops of hay and grain raised upon said land of this defendant, and used for the benefit of said co-partnership, far exceed in value any improvements that have been placed thereon by this defendant out of the fund belonging to this co-partnership.

That for several years past fully 110 acres of said land, the property of this defendant, has been in a high state of cultivation and producing very large crops of hay and grain and the whole of said crop have been appropriated by said firm, and the reasonable rental value of said land, during the continuance of the said partnership has been $2,000, and the defendant has never received any compensation from said firm therefor.

That the title to said land is still in the United States; that defendant is the equitable owner thereof, and the same is the separate and individual property of this defendant." (See pages 13 and 14 of the printed record).

The articles of co-partnership referred to and attached to the answer as Exhibit "A" do not refer in any manner to the land in controversy. (See page 15 of the printed record).

The plaintiff (defendant here) in his reply specifically denied these allegations, and further alleged:

"And that plaintiff alleges that the said filing and said land has been maintained and improved by the partnership and for partnership purposes, and as alleged in the complaint, and that plaintiff denies, etc., etc.

That final proof hereof was duly made on or about June, 1896, duly accepted by the General Land Office, and that said land is subject to sale, conveyance or partition by or between plaintiff and defendant, and that all that remains on the part of the United States is the issuance of patent therefor, and denies that the said land is the separate or individual property of this defendant, but alleges that the same belongs to said partnership, etc. And alleges further that plaintiff (defendant in error) advanced money of his own and permitted the use of partnership funds in the improvement of said alleged timber culture claim with the understanding and agreement on the part of the defendant plaintiff in error that the same should constitute partnership land, and should inure to the benefit of said co-partnership, and that defendant is now estopped from alleging or claiming the said land as and is his individual property." (See pages 20 and 21 of the printed record).

Under Sec. 94, Hills Code of Oregon, all the new matter alleged in the reply is to be deemed controverted by the defendant as upon a direct denial or avoidance, as the case may require. (See also Bellinger & Cotton's Ann. Codes & Stats. of Oregon, Sec. 95).

Upon the issues thus formed the suit was tried and the court in its findings of fact found as contended for the plaintiff in error (See finding No. 7, page 24 of the printed record) and entered its decree accordingly (see page 28 printed record).

From that decree the plaintiff (defendant in error) appealed to the Supreme Court of the State of Oregon, but not as to the whole of the decree but only from that

portion thereof wherein it was recited that I. H. Adams is the legal and equitable owner of the west half of the southwest quarter, and the east half of the southwest quarter of section 24, in township 18, south of range 15, East Willamette Meridian, and that the said firm has not now and never has had any interest therein," and one other portion not material at this time. (See page 29 of the printed record).

Upon the appeal being perfected the appellant (defendant in error) caused to be filed with the clerk of the Supreme Court a transcript of the cause which consisted of a copy, certified by the clerk (of the lower court) of the roll or final record, or the pleadings, orders, papers and journal entries that constitute such roll or record, together with a copy of the notice of appeal, etc. See sub. div. 1, sec. 541, Hills Ann. Laws of Oregon.)

To this transcript was attached all the original papers containing the evidence. (See sub. div. 2, sec. 541, Hills Ann. Laws of Oregon.)

This being a suit in equity the Supreme Court tried the same *de-novo* upon the transcript, and the evidence (Hills Ann. Laws of Oregon, Sec. 543) and modified the decree by declaring among other things:

That at the commencement of this suit the said firm of Steel and Adams, owned the tract known as the Adams timber culture entry, more particularly described as the W. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼ of Sec. 24, Tp. 18, S. R. 45, E. of the W. M. in Malheur county, Oregon, and the cause was remanded to the court below, the Circuit Court of the State of Oregon for Malheur County, with instructions that a decree be entered there

in accordance with the decision of the Supreme Court (See pages 31, 32 and 33 of the printed record.)

Such decree was accordingly entered on the 8th day of October, 1900. (See pages 34, 35 and 36 of the printed record.)

From the appeal thus entered we appeal to this court by writ of error to the Circuit Court of the State of Oregon for Malheur County.

POINTS.

Upon the motion to dismiss we claim

1.

That the writ is directed to the court of final jurisdiction and to the highest court having possession of the complete record, including the final decree.

2.

That the plaintiff in error claimed the land in controversy under the timber culture law of the United States, and that the alleged contract between plaintiff and defendant whereby the plaintiff agreed to enter said land under the timber culture law, for the use of the co-partnership existing between plaintiff and defendant, was and is null and void because it is contrary to the public policy of the United States and the denial of this claim by the Supreme Court of the State of Oregon raises a Federal question.

FIRST.

When the appeal in this suit was perfected all the original record, except the evidence, remained in the court below. A copy of this record was made and certified to by the clerk of the lower court. To this copy

of the record the evidence was attached and thereby the transcript was completed and it was filed in the Supreme Court thereby completing the appeal, from which time the Supreme Court had jurisdiction, and thereafter rendered its decision. (See pages 36 to 41 printed record.)

Then under the well known practice of the Supreme Court in suits in equity the cause was remitted by mandate to the lower court with instructions to that court to enter the final decree in accordance with its decision. The Supreme Court renders the final decision, but the final record of that decision is made in the lower court.

Sec. 546, Hill's Ann. Laws of Oregon, is as follows, "The decision of the appellate court shall be given and enforced as provided in this secton:

1. Under an appeal to the Supreme Court, its decisions shall be entered in the Journal, and the cause remitted by mandate to the court below for further proceedings as therein directed. If a new trial be ordered, upon the receipt of the mandate by the clerk of the court below and decision and orders shall be entered in the Journal and thereafter the cause shall be deemed pending and for trial in such court, according to the directions of the appellate court.

2. If a new trial is not ordered upon the receipt of the mandate by such clerk, a judgment or decree shall be entered in the Journal and docketed in pursuance of the directions of the apellate court, in like manner and with like effect as if the same was given in the court below."

Therefore, the writ of error in this case was properly directed to the circuit court.

Gilston vs. Hoyt, 3 Wheat. 246.

Lee vs. Johnson, 116 U. S. 49.
Hawkes vs. People, 170 U. S. 189.
Brown vs. N. J., 172 U. S 528.
Cumming vs. Board, 175 U. S. 172.
Roller vs. Holly, 176 U. S. 398.
Guasanty vs. Bladow, 176 U. S. 448.
Thorman vs. Fram, 176 U. S. 350.
Murphy vs. Commonwealth, 177 U. S. 155.

The decree we seek to review is the decree of the Supreme Court as well as the decree of the court below, but the court below is in possession of the original and final record and the writ must be directed to the court which holds the proceedings as part of its records and exercises judicial power over them.

Atherton vs. Fowler, 91 U. S. 143.

There is nothing in the record to show that the court below, to which the writ of error is directed, is not in possession of the original evidence. We are not seeking to review the facts, so it is not necessary to have the evidence here. The findings of fact and conclusions of law of the Supreme Court of the State of Oregon in this suit are here and we understand the rule to be that we are bound by the findings of fact.

Eagan vs. Hart., 165 U. S. 188.
Sanford vs. Sanford, 139 U. S. 642.
Anderson vs. Carkins, 135 U. S. 483.

This court can read the decision of the Supreme Court and if it can be determined from that document that a Federal question was raised and that it was decided adversely to the plaintiff in error this court will retain the case.

SECOND.

A careful reading of those portions of the pleadings contained in our statement of the case, together with the decision of the Supreme Court of the State of Oregon, cannot fail to show to this Court that the plaintiff in error claimed the land under the timber culture law of the United States, and that the patent had not been issued at the time the suit was commenced, and at the time the partnership was formed, final proof had not been made and plaintiff in error never did surrender the possession of the land, and that the alleged contract to enter and prove up on it for the use and benefit of the partnership was void as contrary to the public policy of the United States government, and the allegations of the defendant in error as to that contract being in his reply, is under the statutes of Oregon (Hills Ann. Laws of Oregon, Sec. 94) deemed to have been denied and controverted in avoidance. The very peculiar manner of pleading of the defendant in error in the complaint and in the reply, precluded the plaintiff in error from any more definitely pleading and alleging specifically that the said alleged contract was void as against the public policy of the United States, but that the issue thus formed did present such an issue is certainly authenticated by the decision of the Supreme Court which denies plaintiff his rights under the timber culture law. That such a question is a Federal question see Anderson vs. Carkins, 135 U. S. 483.

Kukanne W. P. Co. vs. The Green Bay & Miss. C. Co., 142 U. S. 274.

Wilson vs. Black Bird Mash Co., 27 U. S. 245.

Bridge Proprietors vs. Hobken L. I. Co., 68 U. S. 116.

Chicago L. Ins. Co., vs. Needles, 116 U. S. 574.

Murray vs. Charleston, 96 U. S. 432.

Furman vs. Nichols, 75 U. S. 44.

Eureka vs. Unba, 116 U. S. 410.

Armstrong vs. Attura Co., 41 U. S. 281.

Harris vs. Dennis, 3 Peters 41.

Davis vs. Picard, 6 Peters 41.

Crowell vs. Randall, 10 Peters 368.

Gross vs. Mtg. Co., 108 U. S. 477.

Fire Ass. vs. N. Y., 119 U. S. 110.

Upon the authorities we contend that it is sufficient to give this court jurisdiction if it appears from the record without an averment in so many words, that the decision in the state court was against the privilege or right set up under an act of Congress, and so far as the motion to dismiss is concerned we submit the case to this Honorable Court.

The decree could not have been rendered against the defendant (plaintiff in error) without denying him the protection asserted by him under the timber culture laws, hence the case is one in which a right was specifically set up and claimed under the statute of the United States and the decision of the state court being against that right this court has jurisdiction.

BRIEF ON THE MERITS.

The Supreme Court of the State of Oregon found the following facts and conclusions of law:

"And the court further finds that the said Adams timber culture tract, was included in the said sale by the respondent to the said firm."

"And as conclusions of law from the foregoing facts, the Court further finds:

That at the commencement of this suit the said firm of Steel & Adams, owned the tract known as the Adams timber culture entry, more particularly described as the W. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼ of Sec. 24, Tp. 18 S. of range 45 E, of the W. M., in Malheur county, Oregon."

Upon those findings it entered a decree as follows:

"It is, therefore, further ordered and decreed—the said firm of Steel & Adams is the owner of the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼ of Sec. 24, Tp. 18, S. range 45 E. of E. M., in Malheur county, Oregon, and that the respondent has no interest therein except as a member of said firm."

Under the mandate of the Supreme Court of the State of Oregon the above findings and conclusions of law and decree were entered in the journal of the Circuit Court as its decree, and plaintiff in error relies upon the following specifications of error.

I.

That the Supreme Court of Oregon erred in modifying the decree entered in said cause in the Circuit Court of the State of Oregon, for Malheur county, in regard to the land covered by said timber culture entry.

II.

In not holding and deciding under the pleadings in this case that the partnership of Steel & Adams, consisting of R. M. Steel and I. H. Adams, never owned said land.

III.

Erred in not sustaining the findings of fact and conclusions of law and decree of the Circuit of the State of Oregon, in regard to said land.

IV.

Erred in holding and deciding "That at the commencement of this suit, the said firm of Steel & Adams owned the tract known as the Adams timber culture entry," and decreeing said partnership to be the owner of said land, more particularly described as the west-half (W. $\frac{1}{2}$) of the south-east quarter (S. E. $\frac{1}{4}$) and the east-half (E. $\frac{1}{2}$) of the south-west quarter (S. W. $\frac{1}{4}$) of Section twenty-four (24), township eighteen (18) south range forty-five, E. W. M., in Malheur County, Oregon.

V.

Erred in decreeing and commanding the Circuit Court of the State of Oregon for Malheur County, to decree that the said firm of Steel & Adams is the owner of said land, and that the defendant has no interest therein, except as a member of said firm.

VI.

Erred in not holding that the contract set forth in the complaint and reply regarding said land is contrary to the statute of the United States governing timber culture entries, and the rules and regulations of the Secre-

tary of the Interior in relation to the same, and in not holding that said contract is contrary to the public policy of the Government of the United States, and laws, rules and regulations thereof in regard to the entry of public lands.

It is not necessary to take up these different assignments of error in detail since they each really embody the same essential error.

From the pleadings and findings of the lower court in this case the following facts must be considered as the facts of the case.

1st. That on the 17th day of November, A. D. 1885, R. M. Steel and I. H. Adams, in writing, entered into a partnership agreement.

2nd. At that time the plaintiff in error was in possession of the land involved and had entered it under the timber culture law of the United States, but had not made final proof thereon.

3rd. That at the time of the commencement of this suit the plaintiff in error had proved up on his said timber culture entry and held the ———————— —receiver's duplicate receipt for the same, which entitled him to a patent therefor.

4th. That plaintiff in error had not at the time of the commencement of this suit in any manner transferred any part of said land or any interest therein to R. M. Steel or to the firm of Steel & Adams.

5th. "That plaintiff (R. M. Steel) advanced money of his own and permitted the use of partnership funds in the improvement of said alleged timber culture claim, with the understanding and agreement on the part of the

defendant, I. H. Adams, that the same should constitute partnership lands and should inure to the benefit of said co-partnership."

The Court will observe that the last fact named is contained in the reply for which reason it is deemed fully denied and controverted, under the statutes of Oregon.

By referring to the decision of the lower court, which is a part of the record here, the Court will see that the defendant (plaintiff in error) did most strenuously deny it, and also claims that if it were true it was void as against public policy and as contrary to the timber culture laws of the United States, thereby raising and presenting to the Court a Federal question, which was decided against the plaintiff in error.

To settle this point it will be necessary to examine and construe the timber culture law and the rules and regulations of the General Land Office in relation thereto, and the general policy of the Government in the disposal of the public lands.

The act of Congress, approved June 14, 1878, (20 Stats. 113) is the law referred to as the timber culture law.

Sec. 2 provides that when a person applies to enter land thereunder he must make affidavit before either of certain officers, and in that affidavit he must state under oath:

"That I have made the said publication in good faith and not for the purpose of speculation, and not directly or indirectly for the use or benefit of any other person or persons whomsoever; that I intend to hold and cultivate

the land and to fully comply with the act or acts of which this is amendatory, etc."

Sec. 4 provides that land so entered shall not in any event become liable for any debt or debts contracted before the issuing of the final certificate.

Sec. 5 provides that the commissioner of the General Land office is required to prepare and issue such rules and regulations consistent with the act as shall be necessary and proper to carry the law into effect.

Sec. 6 provides that all the 5th section of the act entitled "An act in addition to an act to punish crimes against the United States, and for other purposes, approved March 3rd, 1857, shall extend to all oaths, affirmations and affidavits required or authorized by this act."

The necessary rules and regulations under the law which govern this case are contained in the general circular of January 1st, 1889, Copp's Land Laws 1890, Vol. 2, p. 85, in which section 5 provides for the affidavit required by the act itself, and section 24 provides where, when and before whom the final proofs and affidavits may be made. Section 26 provides what character of proof shall be made and the form thereof, viz, forms 4-093 and 4-385 and 4-386.

Form 4-385 provides that the claimant shall make an affidavit before the officer taking the final proof to the following effect:

"FINAL AFFIDAVIT.

I, _____ having on the _____ day of _____ 18—, made a timber culture entry at _____

under the timber culture laws of the United States do hereby apply to prove my claim thereto by virtue of the 7th section of the act of June 14th, 1878, entitled, 'An act amending an act entitled an act to encourage the growth of timber on the western prairies,' and for that purpose do solemnly ———————— that my aforesaid entry was made in good faith and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person whomsoever, etc." See General Land Circular for 1899, page 286.

We contend that the timber culture act and the above rules and regulations promulgated by the Commissioner of the General Land Office for the purpose of carrying that law into effect must be read and construed together and that the affidavit required by the regulation is just as binding as the affidavit required by the act itself. Such rules and regulations have the force of law.

U. S. vs. Eaton, 144 U. S. 688.

Now the affidavit required of the claimant at the time he applies for the entry is identically the same as that required at the time he makes his final proof, and by reason of that affidavit any contract made by the claimant prior to his entry is without doubt void as contrary to the statute and public policy of the United States Government, and such a contract cannot possibly be carried out without perjury.

Fleischer vs. Fleischer, 91 N. W. Rep. 51.

but the contract in the case at bar was made after the first affidavit was made, for which reason the Supreme Court of the State of Oregon held that it was not inhibited by the act itself, and, therefore, it was not contrary

to the public policy of the United States and could be enforced after final entry by the applicant. That conclusion is certainly wrong because it is not necessary that an act should expressly forbid the making of the contract.

Harris vs. Runels, 12 Howard 99.

U. S. Bank vs. Owens, 2nd Peters 527.

The Pioneer, Deady 72.

Public policy is determined from the constitution, laws and decisions of the Courts of the United States.

15 Amer. & Eng. Ency. of law 933.

Now by reading the timber culture law (20 Stats, pp. 113 to 115) and comparing that statute with the homestead and pre-emption laws it seems very plain that the general policy of the United States in disposing of the public land is to secure to each entryman his entry and to prevent any one individual from securing either directly or indirectly more than one entry under each of the said laws, and any contract which is designed to subvert that general public policy of the Government cannot be enforced in a court of equity.

Anderson vs. Carkings, 135 U. S. 483.

Now we desire to further apply the principle of the case last cited and for that purpose call the special attention of the Court to Sec. 6 of the timber culture act, which adopts into that statute the 5th section of the act of March 3rd, 1859, and that section provides that any person making a false affidavit which is authorized or required under the rules and regulations of the department commits perjury. Then, *a priori*, if the contract in this case was made as found by the court below, it made

in contemplation of the commission of perjury, and, therefore, under the authority of Anderson vs. Carkings supra it is void and cannot be enforced in a court of equity. Either this conclusion is true or else there is no validity in the final affidavit required at the time of making the final proof.

We have cited the case of Fleischer vs. Fleischer, 91 N. W. Rep. 51, and desire to call the attention of the Court to the fact that the Honorable Judge who rendered that decision referred to the decision of the Supreme Court of Oregon to the case at bar (61 Pac. Rep. 659) and in his statement of the Oregon case he used the language:

"In the Oregon case a party who had made a good entry of a tract of land under the timber culture law entered into a written contract to transfer his claim."

The Oregon decision does not say nor does the Court find that the contract was in writing, but from the oral testimony of the witnesses, corroborated by certain memoranda made by George Steel at the time the partnership agreement was entered into the court found that Adams had agreed to sell his timber culture and prove up on it and then transfer it to the partnership. The fact that there ever was such a contract was strenuously denied by Adams and that Steel knew and understood and believed that such a contract would be contrary to law is shown by the character of his testimony, which is cited in the opinion which is a part of the record in this case. If it were possible for this court to review the facts we have no hesitancy in saying that the evidence recited in the decision upon which the findings of fact are based is not sufficient as a matter of law to sustain the findings and decree.

The lower court in its decree cites two cases from the land decisions, :

Sims vs. Bruce, 4 L. D. 369.

U. S. vs. Picard, 5 L. D. 313.

and upon these decisions bases the statement that the timber culture law does not inhibit the claimant who has made his entry in good faith from contracting to sell his claim prior to the final proof, and the law seems to be so interpreted by the Land Department. The cases cited are not similar to the case at bar and do not tend in any manner to uphold the principle established by the Oregon court, viz. That the law does not inhibit the claimant from selling his claim after he has entered it and before final proof. He has the right to sell his claim and relinquish his right to the government if he so desires, and if he offers to do so it is not sufficient ground to constitute a good cause of contest. That is what the Department decided in these two cases. It is not held there or in any other case in the Department that an entryman can sell or contract to sell his right, and agree to prove up and obtain a patent and then deed it to his vendor without violating the provisions of the timber culture law. These cases are not in point. The Court needs only to look at the pleadings to determine the point at issue here. We desire to call your attention to the peculiar allegations of the complaint and reply in regard to the timber culture laws. In the complaint the allegations are to the effect that the land was purchased by Adams and paid for with funds belonging to the partnership before he took the title in his own name. See paragraphs 6 and 9 of the complaint, (pages 2 and 3 of record.) In the reply an entirely different state of facts is set up, viz, that Adams-

filed upon the land under the timber culture law, and agreed with Steel that the entry should be maintained and the land improved as partnership land and should be maintained for the benefit of the partnership at the expense of and out of the partnership funds. The allegations of the reply sets up a contract void as against the public policy of the United States and contrary to the timber culture law, and the lower court erred in not dismissing the case sue sponte.

Oscangan vs. Winchester Arms Co., 103 U. S. 261.

Again, the cause of suit as to the timber culture land which is alleged and relied upon in the complaint is entirely different from that set up in the reply, and the facts found by the Court do not sustain the allegation of the complaint. The fact that there was a contract between Adams and Steel whereby Adams agreed to prove up on his timber culture claim and then transfer it to the partnership does not tend to prove or establish the allegation that Adams had purchased the timber culture, or the land which is covered by the timber culture entry with funds belonging to the partnership. Therefore, the two causes of suit, the one in the complaint, the other in reply, are based upon entirely different facts and the plaintiff should not have been allowed to have abandoned his complaint and recovered on his reply. An entry under the Land Laws of the United States is not a purchase. The reply was clearly a departure from the complaint.

6 Am. & Eng. P. & P. 460.

With these brief suggestions and citations we most respectfully submit the case to this honorable court.

R. J. SLATER,
Attorney for Plaintiff in Error.